

Order 2002-12-15



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Served: December 20, 2002

Issued by the Department of Transportation
on the 20th day of December, 2002

Application of

**AEROLANE LINEAS AEREAS NACIONALES
DEL ECUADOR S.A. D/B/A LAN ECUADOR**

Docket OST-2002-13661

for an exemption under 49 U.S.C. § 40109

ORDER DENYING EXEMPTION

Summary

In this order, we deny the request of Aerolane Lineas Aereas Nacionales del Ecuador S.A. (d/b/a Lan Ecuador), a foreign air carrier of Ecuador, for exemption authority to engage in scheduled foreign air transportation of persons, property and mail in the Ecuador-U.S. market.

Application

By application filed October 23, 2002, as amended November 6, Lan Ecuador requests an exemption from 49 U.S.C. § 41301 to engage in scheduled foreign air transportation of persons, property and mail between Guayaquil and Quito, Ecuador, on the one hand, and Miami and New York, on the other hand.^{1 2} In support of its exemption request, Lan Ecuador states that it is a privately owned corporation incorporated under the laws of Ecuador; the authority requested is consistent with the U.S.-Ecuador Agreement; and that it is licensed and designated by the Government of Ecuador to perform the proposed services.

¹ In its November 6 submission, Lan Ecuador withdrew a request to conduct charter operations.

² Lan Ecuador states that it will conduct the proposed services using aircraft wet leased from Lan Chile, S.A. On October 24, 2002, Lan Chile filed a request for a statement of authorization under Part 212 of the Department's rules to wet lease aircraft to Lan Ecuador. See Foreign Air Carrier Licensing Division reference 2002-447.

As part of its application, Lan Ecuador noted that 100% of its voting shares are owned by Lan Chile Investment Limited, a Cayman Islands corporation, which in turn is 100% owned by Lan Chile S.A. Lan Ecuador states that its board of directors consists of three Chilean, one U.S. and one Ecuadorian citizen, and all four key management positions are held by citizens of Chile. In this regard, Lan Ecuador requests a waiver of the ownership and control requirements contained in Article 3(2) of the U.S.-Ecuador Air Transport Agreement (U.S.-Ecuador Agreement).³ Lan Ecuador states that, in light of the Open-Skies agreement between the United States and Chile, ownership and control by nationals of Chile would not be inimical to U.S. aviation policy or interests, and it cites ownership and control waivers the Department has granted to four other foreign carriers to support its position.⁴

Responsive pleadings

Continental Airlines, Inc. filed an answer opposing the applications of Lan Ecuador and Lan Chile. Northwest Airlines, Inc. filed a reply supporting Continental's position. Lan Ecuador filed a reply responding to Continental.

Continental states that we should not consider Lan Ecuador's request for waiver of the ownership and control standard "unless and until Ecuador agrees to permit codesharing by U.S. carriers serving Ecuador." Continental further states that not one of the cases cited by Lan Ecuador to support its ownership and control waiver involve a situation where the third-country owner held 100% of the ownership interest and all of the officers and most of the directors were non-homeland nationals; and, that Lan Ecuador would be operated as an arm of Lan Chile at the same time as Ecuador prohibits Continental from entering into cooperative arrangements for codesharing on U.S.-Ecuador routes with its U.S. and foreign partners.

Northwest concurs with Continental and states that we should deny Lan Ecuador's request "at least until Ecuador permits Northwest and Continental to code-share with one another on Continental's Ecuador flights." Northwest further states that it has long been concerned that the U.S.-Ecuador Agreement does not provide for same-country code-share services; that the Lan Chile/Lan Ecuador ownership and control relationship is more extensive than any previous relationship for which the Department has granted an ownership and control waiver; and that granting an extra-bilateral ownership and control waiver at a time when

³ Article 3(2) provides that each side will grant appropriate authorizations and permissions provided that "substantial ownership and effective control of that airline are vested in the party designating the airline, nationals of that party, or both."

⁴ Air Aruba, N.V.; Aerovias Nacionales Ecuatorianas, S.A. (Aeronem); Air Plus Argentina, S.A.; and Cielos del Peru, S.A. (Export Air). Lan Ecuador application, at 2.

Lan Ecuador has failed to demonstrate that Ecuador would approve extra-bilateral same-country code-share services would be inimical to U.S. carrier interests.⁵

Lan Ecuador, in its reply to Continental, states that Continental has presented no basis warranting denial of Lan Ecuador's request. Lan Ecuador further states that Continental's opposition to the arrangement is based on Ecuador's alleged refusal to allow Continental to conduct code-share services in the U.S.-Ecuador market; Lan Ecuador's ownership and control situation is unrelated to Continental's inability to conduct U.S.-Ecuador code-share services; and Continental has provided no details concerning any code-share service it would like to implement in the market.

Decision

We have decided to deny Lan Ecuador's request. In determining whether to grant an exemption to a foreign carrier under 49 U.S.C. § 40109, the statutory finding we must make is that the exemption would be consistent with the public interest. In the case before us here, we cannot make that finding.

It has long been Department policy to require foreign carriers to be substantially owned and effectively controlled by citizens of their respective homelands. The U.S.-Ecuador bilateral agreement expressly establishes homeland ownership and effective control as a condition for securing a license from the other party. In the absence of such ownership and control, the grant of a license to a carrier is entirely within our discretion. In recognition that there are occasionally non-homeland ownership interests in foreign carriers, we have sometimes granted waivers of our ownership and control policies where we could find that such a grant would not be inimical to U.S. aviation policy or interests. However, we are unable to make the necessary determination to support the grant of a waiver in this instance.

The record shows that Lan Ecuador is ultimately owned, in its entirety, by Lan Chile. Chilean interests are also in a position to exercise effective control. Lan Ecuador's board of directors consists of three Chilean, one U.S. and one Ecuadorian citizen.⁶ Moreover, all four key management positions of Lan Ecuador are held by citizens of Chile with recent affiliations with Lan Chile. The record also clearly demonstrates that the management structure of Lan Ecuador is characterized by the presence of Chilean rather than Ecuadorian influence in the day-to-day operations and decision making of the company.

⁵ Northwest states that in the Air Aruba case cited by Lan Ecuador to support its ownership and control waiver the Department took into account the aviation relationships with both Aruba and Venezuela; while in this case Lan Ecuador asks that we consider only the U.S.-Chile relationship to justify the waiver.

⁶ The U.S. citizen on the board of directors is also an employee of Lan Chile.

The question thus becomes one of whether, given these facts, we can find that Lan Ecuador meets our test to grant the waiver necessary for approval of its application. We conclude that in this case we cannot make that finding.

Of principal concern is that we have a restrictive aviation regime with Ecuador. The record plainly shows that U.S. carriers currently have unmet operating aspirations in the U.S.-Ecuador market, and given the restrictive nature of our relationship, U.S. carriers do not have full flexibility to respond to changing market demands in the future. Furthermore, the extent of non-homeland ownership and control presented by the applicant here is significantly greater than in any comparable case where we have found a waiver to be warranted in recent years.⁷ In our view, in the circumstances presented, an Open-Skies agreement with Ecuador would be a prerequisite for even considering a waiver of our ownership and control policy. Against this background, we cannot find that the grant of an ownership and control waiver here is warranted.

Given that we cannot find that grant of the requisite ownership and control waiver is justified in this case, we cannot conclude that grant to Lan Ecuador of the exemption authority it seeks is in the public interest. Therefore we shall deny its application.

ACCORDINGLY,

1. We deny the request of Lan Ecuador for an exemption from 49 U.S.C. § 41301 to engage in scheduled foreign air transportation of persons, property and mail between Guayaquil and Quito, Ecuador, on the one hand, and Miami and New York, on the other hand; and

⁷ In each of the cases cited by Lan Ecuador, we found that there was a significant measure of homeland ownership and control. In the Air Aruba case (Order 99-3-21), we noted a significant amount of the authorized share capital of Air Aruba was to be held by the Government of Aruba and that the government insisted on certain conditions to the proposed arrangement with the Venezuelan corporation to retain control of Air Aruba's corporate structure and its status as the national airline of Aruba. Similarly, we found significant homeland ownership and control in the other cases cited by Lan Ecuador. For example, in the case of Aerovias Nacionales Ecuatorianas, S.A. (Aeronem) in Docket OST-95-713, the carrier reported that it was 60% owned by Ecuadorian citizens and 40% by French citizens, while in Air Plus Argentina (Docket OST-99-6400), we noted that the carrier was 27% owned by two Argentine citizens, with the remainder owned by an Argentine corporation which in turn was majority owned by a Uruguayan corporation (in addition, eight of Air Plus Argentina's nine directors, officers and key management personnel were citizens of Argentina). Finally, in the case of Cielos del Peru, S.A. (Export Air) in Docket OST-95-617, we noted the presence of 30% homeland ownership and the fact that two of Export Air's three directors and substantially all of its key management personnel were citizens of Peru, the homeland of the applicant.

2. We shall serve a copy of this order on Lan Ecuador; Continental, Airlines, Inc.; Northwest Airlines, Inc.; the Ambassador of Ecuador in the United States; the Federal Aviation Administration (Miami IFO); and the Department of State.

By:

READ C. VAN DE WATER
Assistant Secretary for Aviation
and International Affairs

(SEAL)

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